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SULZER PUMPS (US) INC.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JO GUNTER HEWITT, individually and on  
Behalf of the Estate of RONALD HEWITT,  
decedent; SUSAN SIMPSON; RHONDA  
KNIGHT and DOES ONE through TEN,  
inclusive,

Plaintiffs,

v.

ALLIS CHALMERS CORPORATION  
PRODUCT LIABILITY TRUST, et al.,

Defendants.

Case No.: 3:07-CV-03474-JCS

**ANSWER OF DEFENDANT TO  
PLAINTIFFS' UNVERIFIED SECOND  
AMENDED COMPLAINT FOR  
WRONGFUL DEATH**

Defendant SULZER PUMPS (US) INC. answers Plaintiffs' unverified Complaint  
on its own behalf and on behalf of no other defendant as follows:

**ANSWER**

1. Answering Paragraph 1 of the Complaint, SULZER PUMPS (US) INC. is  
without sufficient knowledge or information to form a belief as to the truth of the  
allegations contained in said paragraph, and, on that basis, denies each and every  
allegation contained therein.

2. Answering Paragraph 2 of the Complaint, SULZER PUMPS (US) INC.  
denies that SULZER PUMPS (US) INC. was the agent, servant, employee and/or joint

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1 venturer of her co-defendants. SULZER PUMPS (US) INC. further denies that SULZER  
2 PUMPS (US) INC., at all said times, was acting in the full course and scope of said  
3 agency, service, employment and/or joint venture. Except as expressly admitted herein,  
4 SULZER PUMPS (US) INC. is without sufficient knowledge or information to form a  
5 belief as to the truth of the remaining allegations contained in said paragraph, and on  
6 that basis denies each and every allegation contained therein.

7 3. Answering Paragraph 3 of the First-Amended Complaint. SULZER  
8 PUMPS (US) INC. admits that it is a corporation incorporated under the laws of  
9 Delaware, with its principal place of business in the State of Oregon. SULZER PUMPS  
10 (US) INC. further admits that SULZER PUMPS (US) INC. is authorized to conduct  
11 business in California, but denies it is specifically conducting business in the County of  
12 San Francisco. Except as expressly admitted herein, SULZER PUMPS (US) INC. is  
13 without sufficient knowledge or information to form a belief as to the truth of the  
14 remaining allegations contained in said paragraph, and on that basis denies each and  
15 every allegation contained therein.

16 **FIRST CAUSE OF ACTION - NEGLIGENCE**

17 **(Wrongful Death)**

18 4. Answering Paragraph 4 of the Complaint, SULZER PUMPS (US) INC. is  
19 without sufficient knowledge or information to form a belief as to the truth of the  
20 allegations contained in said paragraph, and on that basis denies each and every  
21 allegation contained therein.

22 5. Answering Paragraph 5 of the Complaint, SULZER PUMPS (US) INC.  
23 denies that SULZER PUMPS (US) INC. was the agent, servant, employee and/or joint  
24 venturer of her co-defendants, SULZER PUMPS (US) INC. further denies that SULZER  
25 PUMPS (US) INC., at all said times, was acting in the full course and scope of said  
26 agency, service, employment and/or joint venture. Except as expressly admitted herein,  
27 SULZER PUMPS (US) INC. is without sufficient knowledge or information to form a  
28 belief as to the truth of the remaining allegations contained in said paragraph, and on

1 that basis denies each and every allegation contained therein.

2 6. Answering Paragraph 6 of the Complaint, SULZER PUMPS (US) INC.  
3 admits that it is a corporation incorporated under the laws of Delaware, with its principal  
4 place of business in the State of Oregon. SULZER PUMPS (US) INC. further admits  
5 that SULZER PUMPS (US) INC. is authorized to conduct business in California, but  
6 denies it is specifically conducting business in San Francisco. Except as expressly  
7 admitted herein, SULZER PUMPS (US) INC. is without sufficient knowledge or  
8 information to form a belief as to the truth of the remaining allegations contained in said  
9 paragraph, and on that basis denies each and every allegation contained therein.

10 7. Answering Paragraph 7 of the Complaint, SULZER PUMPS (US) INC.  
11 denies that SULZER PUMPS (US) INC. was a successor in interest to a business that  
12 was in the business of selling asbestos-containing products. Certain products may have  
13 contained component parts which contained asbestos but which were manufactured by  
14 others. SULZER PUMPS (US) INC. is without sufficient knowledge or information to  
15 form a belief as to the truth of the remaining allegations contained in said paragraph, and  
16 on that basis denies each and every allegation contained therein.

17 8. Answering Paragraph 8 of the Complaint, SULZER PUMPS (US) INC.  
18 denies that the Federal Courts lack jurisdiction over this matter or that removal is  
19 improper. SULZER PUMPS (US) INC. denies that venue is proper in this district under  
20 28 U.S.C. Section 1391 (a)(2). SULZER PUMPS (US) INC. is without sufficient  
21 knowledge or information to form a belief as to the truth of the remaining allegations  
22 contained in said paragraph, and on that basis denies each and every allegation  
23 contained therein.

24 9. Answering Paragraph 9 of the Complaint, SULZER PUMPS (US) INC.  
25 denies that SULZER PUMPS (US) INC. was in the business of selling asbestos-  
26 containing products. Certain products may have contained component parts which  
27 contained asbestos but which were manufactured by others. SULZER PUMPS (US)  
28 INC. is without sufficient knowledge or information to form a belief as to the truth of the

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1 remaining allegations contained in said paragraph, and on that basis denies each and  
2 every allegation contained therein.

3 10. Answering Paragraph 10 of the Complaint, SULZER PUMPS (US) INC.  
4 denies generally and specifically, each and every allegation therein.

5 11. Answering Paragraph 11 of the Complaint, SULZER PUMPS (US) INC.  
6 denies generally and specifically, each and every allegation therein.

7 12. Answering Paragraph 12 of the Complaint, SULZER PUMPS (US) INC. is  
8 without sufficient knowledge form a belief as to the truth of the allegations contained in  
9 said paragraph, and on each and every allegation contained therein.

10 13. Answering Paragraph 13 of the Complaint, SULZER PUMPS (US) INC. is  
11 without sufficient knowledge or information to form a belief as to the truth of the  
12 allegations contained in said paragraph, and on that basis denies each and every  
13 allegation contained therein.

14 14. Answering Paragraph 14 of the Complaint. SULZER PUMPS (US) INC. is  
15 without sufficient knowledge to form a belief as to the truth of the allegations contained in  
16 said paragraph, and on that basis denies each and every allegation contained therein.

17 15. Answering Paragraph 15 of the Complaint. 1ODD is without sufficient  
18 knowledge or information to form a belief as to the truth of the allegations contained in  
19 said paragraph, and on that basis denies each and every allegation contained therein.

20 16. Answering Paragraph 16 of the Complaint, SULZER PUMPS (US) INC. is  
21 without sufficient knowledge or information to form a belief as to the truth of the  
22 allegations contained in said paragraph, and on that basis denies each and every  
23 allegation contained therein.

24 17. Answering Paragraph 17 of the Complaint, SULZER PUMPS (US) INC. is  
25 without sufficient knowledge or information to form a belief as to the truth of the  
26 allegations contained in said paragraph, and on that basis denies each and every  
27 allegation contained therein.

28 18. Answering Paragraph 18 of the Complaint, SULZER PUMPS (US) INC. is

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1 without sufficient knowledge or information to form a belief as to the truth of the  
2 allegations contained in said paragraph, and on that basis denies each and every  
3 allegation contained therein.

4 19. Answering Paragraph 19 of the Complaint, SULZER PUMPS (US) INC. is  
5 without sufficient knowledge or information to form a belief as to the truth of the  
6 allegations contained in said paragraph, and on that basis denies each and every  
7 allegation contained therein.

8 20. Answering Paragraph 20 of the Complaint, SULZER PUMPS (US) INC. is  
9 without sufficient knowledge or information to form a belief as to the truth of the  
10 allegations contained in said paragraph, and on that basis denies each and every  
11 allegation contained therein.

12 **SECOND CAUSE OF ACTION – STRICT LIABILITY**

13 20. Answering Paragraph 20 of the Complaint, SULZER PUMPS (US) INC. is  
14 without sufficient knowledge or information to form a belief as to the truth of the  
15 allegations contained in said paragraph, and on that basis denies each and every  
16 allegation contained therein.

17 21. Answering Paragraph 21 of the Complaint, SULZER PUMPS (US) INC.  
18 denies generally and specifically, each and every allegation therein.

19 22. Answering Paragraph 22 of the Complaint. SULZER PUMPS (US) INC.  
20 denies generally and specifically, each and every allegation therein.

21 23. Answering Paragraph 23 of the Complaint, SULZER PUMPS (US) INC. is  
22 without sufficient knowledge or information to form a belief as to the truth of the  
23 allegations contained in said paragraph, and on that basis denies each and every  
24 allegation contained therein.

25 **THIRD CAUSE OF ACTION - SURVIVAL ACTION**

26 24. Answering Paragraph 24 of the Complaint, SULZER PUMPS (US) INC. is  
27 without sufficient knowledge or information to form a belief as to the truth of the  
28 allegations contained in said paragraph, and on that basis denies each and every

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1 allegation contained therein.

2 25. Answering Paragraph 25 of the Complaint, SULZER PUMPS (US) INC.  
3 denies that decedent Ronald Hewitt had any lawsuit pending against SULZER PUMPS  
4 (US) INC. before he died. As to the remaining allegations, defendant is without sufficient  
5 knowledge or information to form a belief as to the truth of the allegations contained in  
6 said paragraph, and on that basis denies each and every allegation contained therein.

7 26. Answering Paragraph 26 of the Complaint, SULZER PUMPS (US) INC. is  
8 without sufficient knowledge or information to form a belief as to the truth of the  
9 allegations contained in said paragraph, and on that basis denies each and even  
10 allegation contained therein.

11 27. Answering Paragraph 27 of the Complaint, SULZER PUMPS (US) INC. is  
12 without sufficient knowledge or information to form a belief as to the truth of the  
13 allegations contained in said paragraph, and on that basis denies each and every  
14 allegation contained therein.

15 28. Answering Paragraph 28 of the Complaint, SULZER PUMPS (US) INC.  
16 denies generally and specifically, each and every allegation therein.

17 29. Answering Paragraph 29 of the Complaint, SULZER PUMPS (US) INC.  
18 denies generally and specifically, each and every allegation therein.

19 30. Answering Paragraph 30 of the Complaint, SULZER PUMPS (US) INC.  
20 denies generally and specifically, each and every allegation therein.

21 31. Answering Paragraph 31 of the Complaint, SULZER PUMPS (US) INC.  
22 denies generally and specifically, each and every allegation therein.

23 32. Answering Paragraph 32 of the Complaint, SULZER PUMPS (US) INC.  
24 denies generally and specifically, each and every allegation therein.

25 **FOURTH CAUSE OF ACTION - LOSS OF CONSORTIUM**

26 33. Answering Paragraph 33 of the Complaint, SULZER PUMPS (US) INC. is  
27 without sufficient knowledge or information to form a belief as to the truth of the  
28 allegations contained in said paragraph, and on that basis denies each and every

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1 allegation contained therein.

2 34. Answering Paragraph 34 of the Complaint, SULZER PUMPS (US) INC. is  
3 without sufficient knowledge or information to form a belief as to the truth of the  
4 allegations contained in said paragraph, and on that basis denies each and every  
5 allegation contained therein.

6 35. Answering Paragraph 35 of the Complaint, SULZER PUMPS (US) INC. is  
7 without sufficient knowledge or information to form a belief as to the truth of the  
8 allegations contained in said paragraph, and on that basis denies each and even  
9 allegation contained therein.

10 36. Answering Paragraph 36 of the Complaint, SULZER PUMPS (US) INC. is  
11 without sufficient knowledge or information to form a belief as to the truth of the  
12 allegations contained in said paragraph, and on that basis denies each and even  
13 allegation contained therein.

14 **FIRST AFFIRMATIVE DEFENSE**

15 Neither the Complaint nor any purported cause of action alleged by the Plaintiffs  
16 therein states facts sufficient to constitute a cause of action against Defendant.

17 **SECOND AFFIRMATIVE DEFENSE**

18 To the extent the Complaint asserts Defendant's alleged "market share" liability,  
19 or "enterprise liability," the Complaint fails to state facts sufficient to constitute a cause of  
20 action against Defendant.

21 **THIRD AFFIRMATIVE DEFENSE**

22 Neither the Complaint nor any purported cause of action alleged therein states  
23 facts sufficient to entitle Plaintiffs to an award of punitive damages against Defendant.

24 **FOURTH AFFIRMATIVE DEFENSE**

25 The imposition of any punitive damages in this matter would deprive Defendant of  
26 its property without due process of law under the California Constitution and United  
27 States Constitution.

28

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**FIFTH AFFIRMATIVE DEFENSE**

The imposition of any punitive damages in this matter would violate the United States Constitution's prohibition against laws impairing the obligation of contracts.

**SIXTH AFFIRMATIVE DEFENSE**

The imposition of any punitive damages in this matter would constitute a criminal fine or penalty and should, therefore, be remitted on the ground that the award violates the United States Constitution.

**SEVENTH AFFIRMATIVE DEFENSE**

Plaintiffs' action, and each alleged cause of action, is barred by the applicable statute of limitations, including but not limited to California Code of Civil Procedure, Sections 338, 339, 340.2, 343, 361, and 474 and California Commercial Code, Section 2725 and including any applicable statute of limitation and/or statute of repose of the state of Plaintiffs' residence if not California.

**EIGHTH AFFIRMATIVE DEFENSE**

Plaintiffs unreasonably delayed in bringing this action, without good cause therefor, and thereby have prejudiced Defendant as a direct and proximate result of such delay; accordingly, this action is barred by laches.

**NINTH AFFIRMATIVE DEFENSE**

Plaintiffs' decedent was negligent in and about the matters alleged in the Complaint and in each alleged cause of action; this negligence proximately caused, in whole or in part, the damages alleged in the Complaint. In the event Plaintiffs are entitled to any damages, the amount of these damages should be reduced by the comparative fault of Plaintiffs' decedent and any person whose negligent acts or omissions are imputed to Plaintiffs.

**TENTH AFFIRMATIVE DEFENSE**

Plaintiffs' decedent knowingly, voluntarily and unreasonably undertook to encounter each of the risks and hazards, if any, referred to in the Complaint and each alleged cause of action, and this undertaking proximately caused and contributed to any



1 loss, injury or damages incurred by Plaintiffs.

2 **ELEVENTH AFFIRMATIVE DEFENSE**

3 Any loss, injury or damage incurred by Plaintiffs was proximately caused by the  
4 negligent or willful acts or omissions of parties whom Defendant neither controlled nor  
5 had the right to control, and was not proximately caused by any acts, omissions or other  
6 conduct of Defendant.

7 **TWELFTH AFFIRMATIVE DEFENSE**

8 The products referred to in the Complaint were misused, abused or altered by  
9 Plaintiffs' decedent or by others; the misuse, abuse or alteration was not reasonably  
10 foreseeable to Defendant, and proximately caused any loss, injury or damages incurred  
11 by Plaintiffs.

12 **THIRTEENTH AFFIRMATIVE DEFENSE**

13 Defendant alleges that its products were manufactured, produced, supplied, sold  
14 and distributed in mandatory conformity with specifications promulgated by the United  
15 States Government and/or other foreign government under its war powers, as set forth in  
16 its Constitution, and/or laws of that country, and that any recovery by Plaintiffs on the  
17 Complaint on file herein is barred in consequence of the exercise of those sovereign  
18 powers.

19 **FOURTEENTH AFFIRMATIVE DEFENSE**

20 Plaintiffs and their decedent failed to exercise due diligence to mitigate their loss,  
21 injury or damages; accordingly, the amount of damages to which Plaintiffs are entitled, if  
22 any, should be reduced by the amount of damages which would have otherwise been  
23 mitigated.

24 **FIFTEENTH AFFIRMATIVE DEFENSE**

25 The Court lacks subject matter jurisdiction over the matters alleged in the  
26 Complaint because the Complaint and each alleged cause of action against Defendant  
27 is barred by the provisions of California Labor Code, Section 3601, et seq.  
28

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**SIXTEENTH AFFIRMATIVE DEFENSE**

Defendant alleges that at the time of the injuries alleged in the Complaint, Plaintiffs' decedent was employed and he was entitled to receive Workers' Compensation benefits from his employer; that Plaintiffs' decedent's employer, other than Defendant, was negligent in and about the matters referred to in said Complaint, and that such negligence on the part of said employer proximately and concurrently contributed to any loss or damage complained of by Plaintiffs, if any there were; and that by reason thereof Defendant is entitled to set off any such benefits to be received by Plaintiffs against any judgment which may be rendered in favor of Plaintiffs.

**SEVENTEENTH AFFIRMATIVE DEFENSE**

Discovery may show that at the time of the injuries alleged in the Complaint, Plaintiffs' decedent was employed by and entitled to Workers' Compensation benefits from Defendant; such benefits constitute Plaintiffs' exclusive remedy pursuant to Labor Code section 3600 et seq.

**EIGHTEENTH AFFIRMATIVE DEFENSE**

Defendant alleges that at the time of the injuries alleged in the Complaint, Plaintiffs' decedent's employers were negligent in and about the matters referred to in said Complaint, and that such negligence on the part of said employers proximately and concurrently contributed to any loss or damage, including non-economic damages, complained of by Plaintiffs, if any there were; and that Defendant is not liable for said employers' proportionate share of non-economic damages.

**NINETEENTH AFFIRMATIVE DEFENSE**

Defendant alleges that at the time of the injuries alleged in the Complaint, parties other than this Defendant were negligent in and about the matters referred to in said Complaint, and that such negligence on the part of said parties proximately and concurrently contributed to any loss or damage, including non-economic damages, complained of by Plaintiffs, if any there were; and that Defendant herein shall not be liable for said parties' proportionate share of non-economic damages.

**TWENTIETH AFFIRMATIVE DEFENSE**

Defendant alleges that at all times relevant to matters alleged in the Complaint, Plaintiffs' decedent's employer was a sophisticated user of asbestos-containing products and the employer's negligence in providing the product to its employees in a negligent, careless and reckless manner is a superseding cause of Plaintiffs' injuries.

**TWENTY-FIRST AFFIRMATIVE DEFENSE**

If Plaintiffs or their decedent have received, or in the future may receive, Workers' Compensation benefits from Defendant under the Labor Code of the State of California as a consequence of the alleged industrial injury referred to in the Complaint, and in the event that Defendant is held liable to Plaintiffs, any award against Defendant must be reduced in the amount of all such benefits received by Plaintiffs or their decedent.

**TWENTY-SECOND AFFIRMATIVE DEFENSE**

If Plaintiffs or their decedent have received, or in the future may receive, Workers' Compensation benefits from Defendant under the Labor Code of the State of California as a consequence of the alleged industrial injury referred to in the Complaint, and in the event Plaintiffs are awarded damages against Defendant, Defendant claims a credit against this award to the extent that Defendant is barred from enforcing its rights to reimbursement for Worker's Compensation benefits that Plaintiffs or their decedent have received or may in the future receive.

**TWENTY-THIRD AFFIRMATIVE DEFENSE**

If Plaintiffs or their decedent have received, or in the future may receive Workers' Compensation benefits from Defendant under the Labor Code of the State of California as a consequence of the alleged industrial injury referred to in the Complaint, Defendant demands repayment of any such Workers' Compensation benefits in the event that Plaintiffs recover tort damages as a result of the industrial injury allegedly involved here.

**TWENTY-FOURTH AFFIRMATIVE DEFENSE**

Although Defendant denies the validity of Plaintiffs' claims, in the event those claims are held valid and not barred by the statute of limitations or otherwise, Defendant

1 asserts that cross-demands for money have existed between Plaintiffs and Defendant  
2 and the demands are compensated, so far as they equal each other, pursuant to  
3 California Code of Civil Procedure Section 431.70.

4 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

5 At all times and places in the Complaint, neither Plaintiffs nor their decedent were  
6 in privity of contract with Defendant and said lack of privity bars Plaintiffs' recovery  
7 herein upon any theory of warranty.

8 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

9 Plaintiffs are barred from recovery in that all products produced by Defendant  
10 were in conformity with the existing state-of-the-art, and as a result, these products were  
11 not defective in any manner.

12 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

13 Defendant did not and does not have a substantial percentage of the market for  
14 the asbestos-containing products which allegedly caused Plaintiffs' injuries. Therefore,  
15 Defendant may not be held liable to Plaintiffs based on this Defendant's alleged  
16 percentage share of the applicable market.

17 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

18 Defendant denies any and all liability to the extent that Plaintiffs assert  
19 Defendant's alleged liability as a successor, successor in business, successor in product  
20 line or a portion thereof, assign, predecessor, predecessor in business, predecessor in  
21 product line or a portion thereof, parent, alter ego, equitable trustee, subsidiary, wholly or  
22 partially owned by, or the whole or partial owner of or member in an entity researching,  
23 studying, manufacturing, fabricating, designing, labeling, assembling, distributing,  
24 leasing, buying, offering for sale, selling, inspecting, servicing, installing, contracting for  
25 installation, repairing, marketing, warranting, rebranding, manufacturing for others,  
26 packaging and advertising a certain substance, the generic name of which is asbestos or  
27 a product which contains asbestos.  
28

**TWENTY-NINTH AFFIRMATIVE DEFENSE**

Defendant had no knowledge that any of the alleged activities of which Plaintiffs complain, and which allegedly were conducted on premises where this Defendant performed work, were unsafe or dangerous, and Defendant therefore did not have a duty to warn Plaintiffs regarding any such alleged dangers.

**THIRTIETH AFFIRMATIVE DEFENSE**

Defendant alleges that it was under no legal duty to warn Plaintiffs or their decedent of the hazards associated with the use of products containing asbestos. Defendant further alleges that the purchasers of said products, Plaintiffs' decedent's employer/s, his union/s or certain third parties yet to be identified, were knowledgeable and sophisticated users and were in a better position to warn Plaintiffs and their decedent of the risks associated with using products containing asbestos and, assuming a warning was required, it was the failure of such persons or entities to give such a warning that was the proximate and superseding cause of Plaintiffs damages, if any.

**THIRTY-FIRST AFFIRMATIVE DEFENSE**

Defendant alleges that no conduct by or attributable to it was the cause in fact or the proximate cause of the damages, if any, suffered by Plaintiffs, nor a substantial factor in bringing about said damages.

**THIRTY-SECOND AFFIRMATIVE DEFENSE**

Defendant alleges that its liability, if any, in this matter is extremely minor relative to the liability of various third parties and, therefore, the damages, if any, assessed against it should be proportionate to the degree, nature and extent of its fault.

**THIRTY-THIRD AFFIRMATIVE DEFENSE**

Plaintiffs herein have failed to join indispensable parties and the complaint is thereby defective, and Plaintiffs are thereby precluded from any recovery whatsoever as prayed for herein.

**THIRTY-FOURTH AFFIRMATIVE DEFENSE**

Defendant alleges that if Plaintiffs' or their decedent's claims were already

1 litigated and resolved in any prior action, Plaintiffs' claims herein are barred based on the  
2 primary right and res judicata doctrines which prohibit splitting a single cause of action  
3 into successive suits, and seeking new recovery for injuries for which the Plaintiffs or  
4 their decedent were previously compensated by alleged joint tortfeasors.

5 **THIRTY-FIFTH AFFIRMATIVE DEFENSE**

6 Pursuant to California Code of Civil Procedure sections 378 and 430.10(d), if it is  
7 determined that multiple Plaintiffs have been listed on this complaint, then this  
8 Defendant contends the Plaintiffs are misjoined. Because joinder is defective and  
9 improper, and Defendants will be prejudiced by having to proceed against different  
10 Plaintiffs with dissimilar cases, a single trial is unfair and a hardship, and separate trials  
11 on each individual cause of action should be ordered.

12 **THIRTY-SIXTH AFFIRMATIVE DEFENSE**

13 The matters alleged in this complaint are encompassed within and barred by a  
14 settlement and release agreement reached by the parties which operates as a merger  
15 and bar against any further litigation on matters raised or potentially raised in connection  
16 with the settlement and release.

17 **THIRTY-SEVENTH AFFIRMATIVE DEFENSE**

18 To the extent that Plaintiffs or their decedent have previously filed a dismissal in  
19 court dismissing all of their asserted claims, causes of action, and other theories of  
20 liability against this Defendant with prejudice, the matters alleged in this complaint are  
21 barred by retraxit.

22 **THIRTY-EIGHTH AFFIRMATIVE DEFENSE**

23 To the extent that Plaintiffs or their decedent have reached an accord with  
24 Defendant regarding this litigation and this accord was then properly satisfied, the  
25 claims, causes of action, theories of liability and matters alleged in this complaint are  
26 barred by the doctrine of accord and satisfaction.

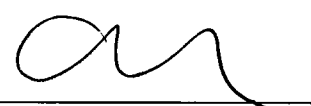
27 WHEREFORE, Defendant prays:

28 (1) That Plaintiffs take nothing by their Complaint;

- (2) That Judgment be entered in favor of Defendant;
- (3) For recovery of Defendant's costs of suit;
- (4) For appropriate credits and set-offs; and
- (5) For such other and further relief as the Court deems just and proper.

DATED: July 16, 2007

SCHIFF HARDIN LLP

By   
ALEX P. CATALONA  
Attorneys for Defendant  
SULZER PUMPS (US) INC.

SCHIFFHARDIN LLP  
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**PROOF OF SERVICE**

(JO GUNTER HEWITT, et al. v. ALLIS CHALMERS CORP. PRODUCT LIABILITY TRUST, et al.  
United States District Court, Northern District of California Case No. 3:07-CV-03474-JCS)

I, the undersigned, declare:

I am a resident of the State of California and over the age of eighteen (18) years, and not a party to the within action. I am an employee of Schiff Hardin LLP, and my business address is One Market, Spear Street Tower, Thirty Second Floor, San Francisco, California 94105.

On the date below, I caused to be served the following document(s):

**ANSWER OF DEFENDANT TO PLAINTIFFS' UNVERIFIED  
SECOND AMENDED COMPLAINT FOR WRONGFUL DEATH**

☒ **BY E-FILING:** By electronically serving the document(s) via the ECF/PACER system on the recipients designated on the Transaction Receipt located on the CAND ECF/PACER website.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 17, 2007, at San Francisco, California.

  
\_\_\_\_\_  
DANIEL W. GUNN

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